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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAMES T. SMITH,

Plaintiff and Appellant,

v.

MARTIN BATES,

Defendant and Respondent.

B211747

(Los Angeles County
Super. Ct. No. BC356824)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Yvette M. Palazuelos, Judge. Affirmed.

Armstrong & Armstrong and James J. Armstrong for Plaintiff and Appellant.
Cohen & Burge and Steven R. Jensen for Defendant and Respondent.

A probationary firefighter sued an individual who wrote a letter to the fire department chief urging him to investigate the firefighter's off duty verbal altercation with a high school student. He alleged two causes of action: defamation and intentional infliction of emotional distress. The trial court found that the letter was a communication to a governmental official which preceded official proceedings and as such was absolutely privileged. Accordingly, the trial court granted the individual's motion for summary judgment and dismissed him from the action. We affirm.

BACKGROUND

On July 22, 2004, James T. Smith was employed by the Los Angeles Fire Department as a probationary firefighter. He had previously served in the United States Marine Corp and was a veteran of the Iraqi war.

On Saturday morning, April 9, 2005, at Smith's younger brother's high school baseball practice M.L., one of the baseball players, insulted Smith's father and used profanity. After the baseball coaches cancelled the practice Smith's father drove to Smith's residence and told Smith how M.L. had insulted him. Smith immediately drove to the baseball field, confronted M.L., and told him to apologize to Smith's father. A verbal altercation ensued and M.L. walked away crying and cursing at Smith. Smith pointed his finger at M.L. and said that if M.L. was 18 he would "kick his ass," or words of similar import. One of the baseball coaches intervened and convinced Smith to leave the field.

Several baseball players observed the exchange and one of their coaches described the players as being visibly upset. The coach brought all the players into the clubhouse and requested each player to write out a statement of what they recalled of the incident.

Martin Bates is M.L.'s grandfather. At the time of the incident, he was also president of the Ventura County Board of Education. On Sunday, April 10, 2009, he sent a letter by facsimile transmission to William R. Bamattre, then Chief of the Los Angeles

Fire Department, written on Ventura County Board of Education letterhead. Bates's letter stated:

"I am an elected representative to the Ventura County Board of Education and currently the President. I represent the Conejo Valley Unified School District area of Ventura County.

"In the past two days I have had several calls from concerned parents of baseball players for Thousand Oaks High School.

"Based on the information that they have provided to me: A fire fighter named Jimmy (James/Jim) Smith from your department came on campus (Thousand Oaks High School) and threatened one of the student athletes with bodily harm. 'I will bash out your teeth on the curb[.]' As I understand that it [sic] had to do with one of his relatives.

"We know that Fire Fighters and Police Officers are our first line of defense in protecting our students from harm in any situation.

"We also know that there has been a rash of on campus tragedies.

"Please investigate this matter and let me know the result.

"([I]f my information is not correct and he is a member of the Los Angeles County Department, please let me know and I will direct this correspondence to them)[.]"

Pursuant to department protocol the chief forwarded Bates's letter to the fire department's operations bureau. At the operation bureau's recommendation, the chief appointed high-ranking department personnel to conduct an investigation of the complaint, interview witnesses, and submit a written report of their findings and recommendations. The investigators concluded that Smith had made verbal threats of physical harm to M.L., had not been forthright during his interview regarding the incident, and had thus violated fire department rules and regulations. They recommended that Smith be terminated. Smith elected instead to resign from his position as a probationary firefighter II.

On June 19, 2007, Smith filed his third amended and operative complaint against the City of Los Angeles, the Los Angeles City Fire Department, William R. Bamattre, as

Fire Chief of the City of Los Angeles, Andrew P. Fox, as Deputy Fire Chief and Acting Fire Chief, John Hansen, Fire Captain, the personnel who had conducted the investigation, Craig Yoder, Battalion Fire Chief and Rick Camarena, Fire Captain, and Bates. The complaint alleged two causes of action against Bates: defamation and intentional infliction of emotional distress.

On June 6, 2008, Bates filed a motion for summary judgment to which Smith filed opposition. On August 28, 2008, the court granted Bates's motion and dismissed him from the action, finding that his letter was absolutely privileged under the official proceeding privilege of Civil Code section 47, subdivision (b). This appeal followed.¹

DISCUSSION

Summary Judgment Standard of Review

Summary judgment may be granted if the action has no merit and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (a) & (c).) A defendant carries his burden of showing that a cause of action has no merit if he establishes an affirmative defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

We review the trial court's ruling de novo to determine whether the moving party met his burden of showing that there is no triable issue of any material fact and that he is entitled to judgment as a matter of law. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

Tort Claims

Smith contends the litigation privilege of Civil Code section 47, subdivision (b) (section 47(b)) did not immunize Bates from tort liability for the defamatory letter he sent to the fire department chief. Although Smith may be correct that the *litigation* privilege is not implicated in this case, we disagree that Bates's letter was not absolutely privileged under section 47(b) under the official proceeding privilege.

¹ Bates's codefendants are not parties to this appeal.

Section 47(b) establishes a privilege that, with certain exceptions inapplicable here, bars liability in tort for making certain statements. Pursuant to section 47(b), the privilege bars a civil action for damages for communications made “[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable” by writ of mandate.

In *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350 (*Hagberg*), the Supreme Court reviewed several cases discussing the official proceeding privilege and noted that the majority of the cases that had considered the issue agreed that section 47(b) applied to “complaints to governmental agencies requesting that the agency investigate or remedy wrongdoing. [Citations.]” (*Id.* at p. 363.) The *Hagberg* Court observed that “[b]y the terms of the statute, statements that are made in quasi-judicial proceedings, or ‘any other official proceeding authorized by law’ (§ 47(b)), are privileged to the same extent as statements made in the course of a judicial proceeding. By analogy to cases extending the litigation privilege to statements made outside the courtroom, many cases have held that the official proceeding privilege applies to a communication intended to prompt an administrative agency charged with enforcing the law to investigate or remedy a wrongdoing. As we summarized in *Slaughter v. Friedman* (1982) 32 Cal.3d 149, ‘the privilege protect[s] communications to or from governmental officials which may precede the initiation of formal proceedings.’ (*Id.* at p. 156, italics omitted.)” (*Id.* at p. 362.) The *Hagberg* Court held that statements to law enforcement which may precede official action, even when false, are also absolutely privileged pursuant to the official proceeding privilege of section 47(b). (*Id.* at p. 365.)

The official proceeding privilege applies in this case. Bates contacted the fire department to report possible wrongdoing by one of its firefighters. The purpose of his communication was to urge the fire department to employ its internal administrative procedures to investigate a threat of bodily harm allegedly committed by one of its firefighters. (See L.A. City Charter, art. X, § 1060 [describing predisciplinary procedures

for fire department personnel].) As such, it was a report to a government agency designed to prompt official action and was thus absolutely privileged under section 47(b) as a statement made as part of an official proceeding.² This privilege applied to bar tort liability, not only for Smith’s defamation claim, but also for his claim for intentional infliction of emotional distress based on the allegedly defamatory communication. (See *Hagberg, supra*, 32 Cal.4th at p. 374 [the absolute privilege applies “to all tort actions that seek to impose liability based upon a covered communication, with the exception of malicious prosecution”].)

For purposes of the official proceeding privilege it is immaterial whether Bates was acting in an “official capacity” or was “discharging an official duty” when he wrote the letter on Ventura County Board of Education letterhead. Any citizen’s communication to a government official (even as described by Smith, a “busybody” or “officious intermeddler”) may qualify as a covered communication within the official proceeding privilege if its purpose is to prompt official action. (See, e.g., *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303 [husband’s allegedly unfounded and malicious report to the Department of Motor Vehicles that his estranged wife was unfit to drive because of drug use was absolutely privileged as a communication to a government agency made to initiate official action]; *Lee v. Fick* (2005) 135 Cal.App.4th 89, 96 [parents’ letter complaining about a coach to the school board was written to prompt official action and was absolutely privileged under section 47(b)].)

It is likewise immaterial whether Bates’s statements were maliciously made because the privilege provided by section 47(b) is absolute and “‘cannot be defeated by a showing of malice.’ [Citation.]” (*Hagberg, supra*, 32 Cal.4th at p. 365.)³

² As a statement covered by the official proceeding privilege of section 47(b), Bates’s letter did not also need to qualify under the litigation privilege as well. Accordingly, any discussion of the litigation privilege is unnecessary to this case, as is any discussion of the qualified privilege of section 47, subdivision (c).

³ Penal Code section 148.5 makes it a misdemeanor to knowingly make a false report of a criminal offense to a police officer, attorney general or district attorney, or their deputies. Penal Code section

Smith, nevertheless, contends that because Bates's letter concerned a personal matter between family acquaintances occurring while he was off-duty, out of uniform and outside his employer's jurisdiction, the official proceeding privilege is inapplicable. We disagree.

A firefighter's off-duty conduct may well have a bearing on his fitness as a firefighter and thus be a matter of official concern. The decision in *Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406, illustrates this principle. There a dentist reported to the police department his suspicions that one of their officers either was, or was at risk of becoming, dependent upon prescription drugs. The dentist became suspicious when the officer requested a prescription for painkillers although an examination showed no source of any pain, and because the officer's chart reflected that he had made numerous requests for drugs in the past. (*Id.* at p. 1409.) After the police department conducted an internal investigation the officer was disciplined for improper conduct. (*Id.* at p. 1410.) The officer sued the dentist for revealing his private medical information.

The appellate court concluded that the dentist's report to the police department was absolutely privileged under the official proceeding privilege of section 47(b). The officer argued, however, that the privilege should not apply because he was off-duty, unarmed, and not in uniform when he consulted the dentist. The court rejected his argument and concluded that limiting the privilege to reports of an officer's misconduct only when committed during official hours of employment would be contrary to sound public policy. (*Shaddox v. Bertani, supra*, 110 Cal.App.4th at p. 1416.) The court observed that "[p]olice officers occupy a unique position of trust in our society. They are responsible for enforcing the law and protecting society from criminal acts. They are given the authority to detain and to arrest and, when necessary, to use deadly force'; this authority ultimately rests upon 'the community's confidence in the integrity of its police force.' [Citation, fn. omitted.] To protect that confidence, an officer is judged as much

11172 specifies that anyone who knowingly, or with reckless disregard for the truth, makes a false report of child abuse is subject to civil or criminal liability. Smith cites these sections but fails to explain how they apply, if at all, to a citizen's complaint to a fire department regarding a firefighter's conduct.

by private conduct as by on-duty performance. [Citations.] That a person's unfitness for law enforcement can clearly be found in off-duty behavior has become an established incident of public employment. [Citations.] The occasional unfounded calumny is accepted as a price for public confidence in the institution." (*Id.* at pp. 1416-1417.)

A firefighter occupies an analogous role in society making a firefighter's off-duty conduct equally relevant to his fitness as a firefighter. Firefighters are usually the first responders to accidents, natural disasters and similar threats to public safety as it is their job to "protect lives and property in case of disaster or public calamity." (L.A. City Charter, art. V, § 520, subd. (d).) When at the scene of a fire or an emergency firefighters "have full power and authority to direct the operation of controlling and containing the fire or emergency. The officers may prohibit approach to the fire or emergency site and may remove any person, vehicle, vessel or thing not needed in controlling and containing the fire or emergency or preserving property in the vicinity." (L.A. City Charter, art. V, § 521.) In exercising this authority it is important that the public have confidence that the firefighters will remain calm and in control of emotions in the face of potentially life threatening events when securing an incident scene, controlling access around an accident site, or preventing the public from interfering with firefighters carrying out their duties. A firefighter's off-duty conduct, if it risks harming the public if repeated while on duty, is a legitimate public concern. (See, e.g., *McIntosh v. Monroe Mun. Fire, etc.* (La. Ct. App. 1980) 389 So.2d 410 [firefighter dismissed for repeated off-duty intoxication].)

Procedural Grounds

Smith contends the judgment should be reversed because Bates's separate statement of undisputed facts and supporting evidence did not comply with the formatting requirements of California Rules of Court, rule 3.1350(a), (b), (d) (g) and (h) and the requirements of Code of Civil Procedure section 437c for summary judgment motions. We disagree.

In response to Smith's identical argument the trial court found that the "defects [were] small and [did] not implicate any due process concerns for Plaintiff because the

separate statement only suffer[ed] from this small formatting error and all the attached exhibits [were] clearly marked and readily identifiable. Further the defects [did] not render the motion difficult to read or interpret.” We agree and accordingly reject Smith’s claim of reversible error on procedural grounds.⁴

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.

⁴ Smith makes vague assertions that Bates’s summary judgment motion was untimely and that the trial court erred in ruling on his evidentiary objections. Neither assertion is supported by argument or authority and therefore need not be addressed. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.)